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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1677

PACIFIC LEGAL FOUNDATION, et al.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The concealment of data by the Department of Transportation (DOT) is a major issue in this petition for certiorari. In opposing the petition, DOT raises the claim that while it did conceal information that information was nothing new:

"DOT did not include the Kahane memorandum in the administrative record, but that memorandum did not contain any information not otherwise part of the public record." Respondent's Brief 9.

This statement is false. The Kahane memorandum¹ found that while less than one death should have occurred in the air bag cars on the road, four deaths had in fact occurred. While the Secretary of Transportation dismissed this discrepancy as not statistically significant² (Adams Decision, Petitioners' Appendix F at 59), the Kahane memorandum found it to be "significant at the 99% confidence level." Kahane memorandum 1, quoted at Petitioners' Brief 7. Contrary to DOT's claim, the Kahane memorandum's findings are not to be found anywhere in the rulemaking record—a fact best demonstrated by DOT's failure to identify any specific documents in the record to support its claim.

DOT argues that the presence of raw field data in the record effectively made the findings of the Kahane memorandum "available to the public" despite that document's concealment. Respondent's Brief 8. By DOT's logic, the public would have had available to it the celestial equations of Copernicus merely by contemplating a full moon. The Kahane memorandum is a technical document, involving the use of confidence levels, properly adjusted control groups, and a Poisson distribution rather than

¹ The full title of the Kahane memorandum is: Office of Statistics and Analysis, National Highway Traffic Safety Administration, *Statistical Analysis of Air Bag Deaths* (April 9, 1976).

² While DOT acknowledges that petitioners do not challenge the Secretary's findings before this Court (Respondent's Brief 8), the agency nonetheless attempts to support those findings in its opposition. *Id.* at 8-9. It should be noted that the General Accounting Office has but recently criticized the Secretary's findings in a report which concludes that the agency's estimate of air bag benefits "was based largely on subjective judgment." Comptroller General, *Report to the Congress: Passive Restraints for Automobile Occupants—A Closer Look* at iii (July 27, 1979).

other tests of statistical significance. DOT's haughty suggestion that the public could have performed these calculations independently is singularly inappropriate for an agency entrusted with the public's safety.³

³ The necessity of an *intelligible* rulemaking record has been noted by courts. "[C]alculations . . . not reflected in the record, based on information scattered throughout the record" constitute a "denial of an opportunity for comment." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978). Data which is "obscure if not incomprehensible to readers lacking a key to [its] meaning" is not "sufficient to allow meaningful comment thereon." *WNCR Listeners Guild v. FCC*, No. 76-1692, slip op. at 18-19 (D.C. Cir. June 29, 1979).

CONCLUSION

The unsettling findings of the Kahane memorandum regarding air bag performance are present nowhere in the administrative record. They were concealed from the public which was entitled to them by an agency charged with protecting the public interest. There was no opportunity for public response to the findings, and the Secretary stated his refusal to consider public reaction to air bags themselves. For this reason, and for the other reasons set forth in petitioners' brief, the petition for certiorari should be granted.

Respectfully submitted,

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